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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1491

JAMES R. HOFFA, THOMAS EWING PARKS, EWING KING
and LARRY CAMPBELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

REPLY

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1. The Solicitor General contends (Opp. 4)[1] that **United States v. White**, No. 13 Oct. Term, 1970 (April 5, 1971), is dispositive of Petitioners' contention that King's

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[1] "Opp." references are to the Memorandum for the United States in Opposition filed in this Court.

Fourth, Fifth and Sixth Amendment rights were violated. Petitioners' contentions however are grounded in the teachings set forth by this Court in **Spano v. New York**, 360 U.S. 315, and **Massiah v. United States**, 377 U.S. 201. Contrary to the facts in **White**, but rather like **Massiah**, at the time of the secret interview of King, the government's investigation had passed from the investigatory to the accusatory stage. For the clear purpose of the government's secret interrogation of King after indictment was complete, save for the formality of its return in open court, was not investigatory in nature, but rather sought to uncover defense strategy and plans. Such matters are peculiarly within the protection of the Sixth Amendment.[2] Thus, the brief in opposition does not address itself to Petitioners' prime contention.[3]

The failure of the Solicitor General to perceive the Sixth Amendment's protection and underpinning of Petitioners' contentions is also demonstrated by its argument that the contention "[i]s open only to Petitioner King . . ." The Fourth Amendment cases (**Alderman v. United States**, 394 U.S. 165, 171-176, 184; **Giordano v. United States**, 394 U.S. 310, 312) are not analogous. The "standing" question of a co-defendant in respect to a Fourth Amendment intrusion is essentially dissimilar

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[2] The Solicitor General apparently abandons the Court of Appeals holding that **Hoffa v. United States**, 385 U.S. 293, 309 is apposite (cf. Pet. App. A. 6). In **Hoffa**, this Court's ruling was based on the fact that what was involved was the investigation of an on-going crime. **White**, *supra*, plainly falls within the same frame of reference. Here the alleged crime took place months prior to the time of the interrogation.

[3] The Argument ". . .[t]he government made no use of the questioned recording" (Opp. 4) likewise turns on the interpretation that the King interview sought evidence rather than insight into the defense camp's strategy. In fact, the prosecutor "used" the recording for the purpose for which it was obtained —to discover how strong the defense was (Pet. 11, 17).

from a Sixth Amendment intrusion upon the defense. Defense strategy and planning is commonly, even likely, a joint enterprise among defendants. When a joint indictment is drawn and the government chooses to try defendants jointly, cooperation among those charged becomes an absolute necessity. Intrusion into the common defense is thus patently intrusion on all.

Moreover, since reversal of King's conviction is required, petitioner Hoffa's conviction (as an aider and abettor) must be reversed, since Hoffa could not be convicted unless King was properly convicted (Pet. 20, **Kinser v. Cooper**, 6 Cir., 413 F. 2d 730 (1969)).

2. The Solicitor General limits **Brady v. Maryland**, 373 U.S. 83, claiming that "the short answer to the **Brady** contention is that the recording, as the district court found, was not exculpatory" (Opp. 4-5). **Brady**, however is not so restrictive. It holds that suppression of "evidence favorable to an accused" violates the due process clause. Evidence which on cross-examination of the key witness against a criminal defendant would directly or inferentially impeach his testimony of alleged admissions made by the defendant, certainly should not be held to be outside the **Brady** rule. Grant of certiorari is necessary here in the light of the Solicitor General's argument to clarify the meaning and extent of **Brady**.[4] Denial of certiorari here would apparently endorse the government's argument, which would continue the policy in this re-

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[4] The Solicitor General also seeks to limit the **Brady** contention claiming it "is also available only to King." Plainly, Hoffa at the very least would have standing to complain on the purposeful suppression by the prosecution of evidence tending to show Partin lied when he testified that Hoffa admitted guilt to him. And even if King were not indicted, Hoffa would be entitled to evidence which demonstrated that Partin's testimony, that the alleged principals had committed the crime of which Hoffa was charged as an aider and abetter, was untrue.

spect, apparently currently in vogue of prosecution suppression of such evidence.

Respectfully submitted

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